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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 32

THYME HOLDINGS, LLC D/B/A
WESTGATE GARDENS CARE CENTER

Employer/Respondent

and

Case Nos. 32-CA-190480
32-CA-197298

SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 2015

Union-Charging Party

RESPONDENT'S OPPOSITION TO GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT AND TO CHARGING PARTY'S JOINDER

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I. PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

On November 15, 2016, after a hearing that denied Respondent Thyme Holdings, LLC d/b/a Westgate Gardens Care Center (hereinafter "Westgate"") its due process and equal protection rights, the Regional Director of Region 32 certified Service Employees International Union Local 2015 (hereinafter "Union") as the representative of the Licensed Vocational Nurses (hereinafter "LVNs") working at the skilled nursing facility operated by Westgate in Tulare, California. On March 31, 2017, with then Acting Chairman Miscimarra dissenting, the Board denied Westgate's Request for Review. Thereafter, based on an unfair labor practice charge filed by the Union, a Complaint was issued against Westgate alleging that it had refused to bargain with the Union. After Westgate filed an Answer to the Complaint, the General Counsel filed the instant Motion for Summary Judgment.[1] The Union not only filed a "Joinder" to the Motion but *also asks the Board for new, radical remedies.* Westgate opposes the Motion for Summary Judgment as well as the Union's request for additional relief.

At the hearing, Westgate was denied the right to present evidence and was not told that the Regional Director intended to apply an evidentiary requirement that any "supervisory" testimony be corroborated by the testimony of an employee (or with documentary evidence) in order for the testimony to be accepted as "true". While Westgate could have presented such evidence if it knew that the Regional Director intended to apply such a rule, in the absence of this knowledge,

[1] Attached to Counsel for the General Counsel's Motion for Summary Judgment are various documents (Exhibits 8-12), which purport to be "evidence" in support of the Motion, although *none of these documents have been authenticated under the Federal Rules of Evidence* (nor have they been shown to constitute *admissible evidence*) as required by the Act (29 USC Section 160(b)) and by the Board's Rules (Sec. 102.39). On that ground alone, the Motion must be denied inasmuch as it is not supported by admissible evidence. To the extent that these documents, Exhibits 1-7, 13-17 constitute the Board's records, Westgate has no objection to those documents being considered by the Board. Accordingly, in this Brief, Westgate will reference General Counsel's Exhibits 1-7 and 13-17. In addition, references to the September 13 and 14, 2016, hearing transcript will be as "Tr." followed by a page reference while reference to hearing exhibits shall be as "Hearing Exhibit".

Westgate was effectively "blindsided". Moreover, the Regional Director's "rule" is not consistent with the Federal Rules of Evidence or the United States Constitution. As a result, Westgate was denied a fair hearing in contravention of the Board's Rules, the Federal Rules of Evidence, and the United States Constitution. The Complaint, premised on that hearing and subsequently issued Decision, is, therefore, necessarily flawed.

Moreover, the Union now asks the Board to *impose 9 new remedial requirements*, some of which are based on factual claims that have no support in this record or are self-contradictory. For example, the Union makes *the factual assertion*, without any evidentiary support, that it is a "common place tactic" for an employer to sign any Board Notice with an "illegible" signature so that employees are precluded from knowing who signed the Notice. (Union Joinder Paragraph 4.) Similarly, the Union requests that the Board require that the Notice be read to "all employees" (Union Joinder Paragraph 5) but then asserts that the employer should be required to include the Notice in a payroll statement (Union Joinder Paragraph 7) and then be required to pay employees to read the Notice (Union Joinder Paragraph 8) because, otherwise, the employees would be "unaware" of the Notice. The Union's unprecedented remedial request requires a full Board review of this matter and precludes summary judgment.[2]

With respect to the substance of the underlying representation Decision, the Decision is issued in contravention of appellate court decisions. The Employer should not be required to spend the time and money necessary to obtain judicial review to vindicate its rights when the Board has the power to review the matter and issue a decision in conformity with appellate precedent – all the more so if the Board's present composition would disagree with the Board's previous decision to deny review.

[2] Until the Board decides to consider the Union's request, the Employer will not address the merits of the request other than to state that the request is unprecedented and would constitute a departure from established Board procedure that should not occur until all interested parties have had an opportunity to brief the issue.

II. STATEMENT OF FACTS

A detailed factual summary is set forth in the Employer's filed Request for Review which includes appropriate transcript references. (Exhibit 6.) Accordingly, that factual statement is incorporated herein by reference, and this Statement of Facts will only summarize that much more detailed factual description.

The Employer operates a 140-bed skilled nursing care facility in Visalia, California that provides both short and long-term care to patients. The Employer provides patients with *24-hour a day, seven-day* a week nursing care, and, where necessary, assistance with eating, bathing, toileting, as well as physical, occupational and speech therapy. There are 22 full time Charge LVNs and 15 on-call LVNs who only work when a regular full time Charge LVN is absent.

The Charge LVNs work 3 twelve-hour shifts. They supervise approximately 90 full-time, part-time, and on-call certified and restorative nursing assistants (hereinafter jointly referenced as "CNAs"). The CNAs provide 24/7 care, involving the positioning and repositioning of patients, getting patients out of bed, and assisting patients with feeding, bathing, and toileting. The CNAs work on three 8-hour shifts starting at 6:30 a.m.

During the 12-hour LVN shift, there are two Charge Nurses assigned to each of the three nurses' stations, or a total of six floor nurses on duty. The Charge Nurses report to two Assistant Directors of Nursing (hereinafter "ADONs") and to the Director of Staff Development (hereinafter "DSD"). The ADONs and DSD report to a Director of Nursing (hereinafter "DON") who, in turn, reports to the facility Administrator. The Administrator, DON, ADONs, and DSD are present in the facility only during the day and *are not present after 6 p.m. or on weekends*. From approximately 6 pm to 6 am, and throughout the entire weekend, the highest-level supervisor in the

facility is, and has been, the Charge LVN. Or, in other words, *for 132 hours out of a total of 168 weekly operating hours, the Charge LVN is the only supervisor in the facility*.

III. ARGUMENT

A. THE EMPLOYER'S DUE PROCESS AND EQUAL PROTECTION RIGHTS WERE VIOLATED AS WERE THE BOARD'S RULES, AND THE MATTER SHOULD BE REMANDED TO THE REGIONAL DIRECTOR FOR A NEW HEARING IN CONFORMITY WITH THE BOARD'S STATED RULES AND THE CONSTITUTION.

Unquestionably, the due process and equal protection clauses of the United States Constitution precludes the Board from having one rule of evidence for employers and a far different rule for unions. Yet that is precisely what occurred in this case.

There was more than sufficient evidence in this record of the LVNs' supervisor status, but using her own evidentiary rules, the Regional Director chose to disregard the evidence, and the Board allowed her Decision to stand. Indeed, the Regional Director flatly stated that she was refusing to credit the testimony of a supervisor because it was not corroborated by an employee or by documents.

> "With respect to the other Employer meeting with CNAs that took place on an unspecified date in July, I note that the Employer failed to call as a witness any CNA to corroborate [Administrator] Tolman's account of the meeting. Nor did the Employer offer into evidence any sign-in sheets for any mandatory or non-mandatory staff meetings despite the Employer's usual practice of having attendees sign in on such sheets at meetings they attend." (Exhibit 3, p. 9.)[3]

No such evidentiary rule was applied to the Union's two witnesses. For example, the Regional Director accepted as true the testimony of LVN Gonzales that he lacked the authority to send a CNA home although there was contrary testimony that the LVNs possessed this supervisory power. (Exhibit 3, pp. 6-7.) Yet, nowhere does the Regional Director require corroboration of Gonzales'

[3] As discussed in greater detail *infra,* pp. 13-14, the Hearing Officer could have called such witnesses if he thought it necessary for a "complete" record and/or he could have demanded that the Employer produce supporting documentation or he could have "warned" the Employer that he did not view the record as complete or accurate in the absence of corroborating evidence.

testimony.

The Regional Director imposed this new corroboration rule on the Employer without giving the Employer "advance notice" that such an evidentiary rule would be applied – also a violation of the Employer's Constitutional due process rights.[4] Moreover, the Regional Director's decision is even more egregious given that the Employer was precluded from examining an employee witness – the very LVN upon whose testimony the Regional Director relied.

The Hearing Officer barred the Employer from examining Gonzales on any issues "not covered on direct examination" asserting that the Employer was obligated to call such individuals as "its own witnesses".

> Q BY MR. TELFEIAN [Employer's Counsel]: Now, can you tell me, Mr. Gonzales --
>
> HEARING OFFICER HAJDUK: Mr. Telfeian, I'm also being --I'm also going to tell you right now, at this point that with this document having been received into evidence and the witness has already described his knowledge of it, *I think we're way beyond the scope of direct examination.* And I'm not going to permit further questioning on this subject. I would direct your attention to the questions that were raised up during direct examination right now. By my notes, you have talked through all the questions that I have seen, so unless you have further questions I'm going to direct Mr. Boigues to go to redirect?
>
> (Tr: Vol. 2, p. 450.) (emphasis added.)

Not only were these rulings prejudicial to the Employer, but because the rulings are in direct contravention of the Board's procedures, the Employer had no advance knowledge that such rules would be enforced and then used against it in the resulting decision. The truth is that not only are the Federal Rules of Evidence not applicable to an "R" hearing but the Board's own manual states:

> "Generally in adversarial proceedings, cross-examination is limited to matters raised on direct examination and/or matters going to the witness' credibility. *This has no application in R case*

[4] In his dissent, then Acting Chairman Miscimarra disagreed with the Regional Director's decision to disregard uncontroverted evidence because it was not corroborated, but failed to note that the Regional Director also required "supervisory testimony" to be corroborated by an employee -- a disparate evidentiary rule. (Exhibit 7, p. 2, n. 4.)

> *hearings*. A cross-examiner should normally be permitted to ask a witness questions pertaining to relevant issues raised in the hearing, regardless of whether the subject was raised on direct examination."
>
> *Guide for Hearing Officers in NLRB Representation and Section 10k Proceedings*, p. 37 (emphasis added).

A fair reading of the transcript demonstrates that the Employer was precluded from adducing relevant evidence because the Hearing Officer (as well as the Union's counsel) did not want the hearing to extend to a third day. Indeed, when the Employer sought to call as a witness an LVN who was present in the hearing room, Union Counsel directed the witness to leave on the spurious ground that the LVN was not the "employer's witness" and, therefore, absent a subpoena, could not be called to testify. (Tr: Vol. 2, p. 464.) The Hearing Officer declined to allow the Employer to call this individual as a witness.

Simply stated, the Employer was precluded from obtaining the very corroboration that the Regional Director subsequently demanded that the Employer produce in order to have its "management testimony" credited. Having prevented the Employer from examining relevant "employee" witnesses, the Regional Director was not free to then assert that the Employer had failed to adduce relevant evidence.

Egregious as these violations were, just as bad was the Regional Director's rejection of unrebutted evidence that established the LVNs' supervisory status. The Act is clear that an individual who has the power to "reward" employees is a statutory supervisor. 29 USC Section 152(11). The unrefuted evidence was that the LVNs had the power to evaluate the CNAs working under them and those evaluations determined the raises received by each CNA – a clear and obvious reward.

The *uncontradicted* record evidence showed:

- In July 2016, the LVNs were told, either in the group meeting or individually, that their job description was being modified to require that they review and evaluate the CNAs with whom they worked. They were told *their evaluations* would affect the amount of raises each CNA received. *The CNAs were given this identical information*.
- Simultaneously the LVNs were given a wage increase to compensate them for the additional work duties required of them.
- The July 2016 LVN job description provided that one of the "Essential Job Functions" of the LVN position was: "Perform performance evaluations for staff, including determination of wage increases if applicable."
- In July and August 2016 the LVNs in the facility completed performance evaluations of all of the CNAs .
- When they did the evaluations, the LVNs were fully aware that their evaluations would affect what wage increase was given to the evaluated CNA.
- The particular LVN assigned to do the evaluation was selected by the DSD based on her assessment of which LVN was in the best position to evaluate the CNA.
- The LVNs were given no training or guidance concerning how to complete the evaluations; they used their own independent professional judgment to evaluate the CNAs based on the six enumerated factors listed on the evaluation form.
- The completed evaluations were scored to ascertain if the CNA received an overall rating of excellent, good, satisfactory, fair, or poor.
- No management official independently reviewed or re-did the evaluations.
- 65 CNAs were evaluated by 19 different LVNs.
- 21 CNAs were evaluated as "excellent" and received a 3% wage increase.

- 35 CNAs were evaluated as "good" and received a 2% wage increase.
- 9 CNAs were evaluated as "fair" and received a 1% wage increase.
- The CNAs all received these wage increases.
- The LVNs and CNAs were told that this evaluation process would be on-going and that as each CNA reached his or her "hiring anniversary date", the CNA would be evaluated by the LVNs and given a wage increase based on those evaluations.

Confronted with this evidence, the Regional Director chose to disregard it – either by asserting that the Employer failed to corroborate this evidence or simply ignoring it - so that she could reach her sought after conclusion.

- She asserted that she could not accept the fact that the LVNs had been told that their evaluations would determine the CNAs' wage increases or that the practice would continue in the future because the Employer had not called an LVN to corroborate management testimony.
- She asserted that she could not accept management testimony of the existence of "group meetings" where management told the CNAs of their new responsibilities because neither attendance sheets were introduced into evidence nor was a CNA called to corroborate the existence of the meetings.
- She disregarded management testimony that the LVN selected to evaluate each CNA was specifically chosen as the LVN most familiar with that CNA's work while crediting testimony from one LVN that in his case he was unfamiliar with the CNA's work (although he could not identify an LVN who was in a better position to do the evaluation).
- She disregarded the testimony that these evaluations resulted in the varying raises because it was "not substantiated" by documentary evidence.

- She accepted the testimony of LVN Gonzalez that he had never been told that he would be evaluating the CNAs and those evaluations would determine the CNAs' wage increase over the (1) contrary management testimony and (2) Gonzalez' clear admission that *he received a job description that contained that precise information*. (Tr: Vol. 2, p. 369.)
- She rejected management testimony that each CNA received a raise because "payroll records" were not introduced into evidence to substantiate the testimony.

All of this, and more, demonstrates that the Regional Director, and now by adoption, the Board, applied an *ad hoc* set of evidentiary rules that are in contravention of the Federal Rules of Evidence as well as Constitutional restrictions; to wit, the Employer's testimonial evidence is to be rejected unless corroborated by documentary evidence or employee testimony while the Union's testimonial evidence is to be treated as sacrosanct and to be believed even when contradicted by documentary evidence.

The Federal Rules of Evidence do not contain an evidence "hierarchy" such that documentary evidence is preferred over testimonial evidence or one witness's testimony is "preferred" over the testimony of another witness. *Evidence is evidence*. There is no basis in law to require such corroboration. To require such corroboration from the Employer, while not imposing the identical requirement on the Union constitutes a denial of due process and equal protection.[5]

[5] To the extent that the Regional Director's "corroboration requirement" is premised on her apparent belief that such documentation or supporting "employee" testimony did not exist, the Union was fully capable of demonstrating that proposition. The Union was free to call every single LVN and CNA employed by Westgate as a witness to have them refute the Employer's proffered testimony. Similarly, the Union was free to subpoena documents to show that either such documents do not exist or, if they do exist, that they do not support the Employer's assertions. However, by imposing a "corroboration requirement" on the Employer, the Regional Director effectively relieves the Union from its evidentiary obligations and establishes a "one-sided" test on the Employer to prove its assertions with multiple types of evidence. Indeed, here, the Union had present at the hearing four LVNs. The Union called only one of these LVNs to testify and blocked the Employer from calling a second LVN. Presumably, if these LVNs would have contradicted the

While then Acting Chairman Miscimarra's dissent correctly rejected the Regional Director's decision to ignore "uncontroverted evidence", the Board's majority did not adopt that position. Simply stated, no federal precedent allows uncontroverted evidence to be rejected unless that evidence is discredited. In point of fact, the Eleventh Circuit Court of Appeals made this precise point in refusing to sustain the Board's finding that nursing home LVNs were not supervisors stating: "Our review of the record as a whole reveals that the Board meticulously excluded or disregarded record evidence, which, when taken into account, compels a different result." *Lakeland Health Care Associates, LLC v. NLRB*, 696 F.3d 1332 (2012) citing *Northport Health Services, Inc. v. NLRB,* 961 F.2d 1547, 1552 (11th Cir. 1992).

Finally, under the Board's own rules, the Board's Hearing Officer had *an independent, and affirmative, obligation* to ensure that the record was complete so that a correct decision could be made by the Regional Director. Again, the Board's manual is crystal clear on this point.

> "The hearing officer may cross-examine and *call* and examine witnesses. … It is the *obligation of the hearing officer* to ask follow up questions and *to obtain specific examples when the parties elicit generalized testimony regarding matters in issue*. If the parties cannot supply specific examples in support of their generalized testimony, they should be required to state that on the record. …*Where necessary to ensure the development of a record that is complete, concise and cogent*, it may become necessary for the hearing officer to interrupt the presentation of a party and conduct some or all of the questioning of a witness or witnesses."
>
> *Guide for Hearing Officers in NLRB Representation and Section 10k Proceedings,* p. 7.

The Hearing Officer chose not to fulfill this obligation. *He could have called the three LVNs present in the hearing room and questioned them concerning the "management testimony" presented by the Employer.* Similarly, the Regional Director, having determined that the record was not complete because the Hearing Officer had failed to fulfill his obligations, could have reopened

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Employer's management testimony, the Union would have called them to testify. Yet, the Regional Director concludes that this "absent testimony" justifies rejecting *actual management testimony*.

the record to adduce the evidence she needed to make a complete and accurate record. However, she was not free to disregard the Employer's unrefuted evidence as insufficient when the Board itself imposes an affirmative obligation on her to ensure that the record is complete and accurate.

Moreover, the Union had present at the hearing four LVNs, only two of whom were called to testify. (Tr: 5, 224.) The two called witnesses did *not* contradict any of these relevant facts, and the Union chose not to call any of the other individuals to testify.[6] Thus, although rebuttal testimony was clearly available, *if it existed*, none was put into evidence. Yet, the Regional Director concludes that the Employer's unrebutted evidence should be rejected because *it would have been refuted if LVNs had been called to testify*.

In sum, the conclusion that the LVNs are employees is contrary to the record evidence. The Regional Director's conclusion is based on a violation of the Board's Rules, of federal law, of the Federal Rules of Evidence, and of the United States Constitution. The proper remedy is to deny this motion for summary judgment and to dismiss the Complaint concluding that, on this record, the Westgate LVNs are supervisors.

B. THE CONCLUSION THAT THE LVNs ARE NOT SUPERVISORS IS CONTRADICTED BY EVERY PART OF THE RECORD, AND THE EMPLOYER SHOULD NOT BE REQUIRED TO SPEND THE TIME AND MONEY TO VINDICATE ITS RIGHTS BY JUDICIAL REVIEW WHERE THE ERRORS ARE SO MANIFEST.

The Board has long had a practice of utilizing the summary judgment process to require an employer to "test a union's certification". This process fundamentally denies a party the right to Board review, as mandated by the Act, and violates the Constitution's due process requirements.

Over the dissent of then Acting Chairman Miscimarra, the Board rubber-stamped the

[6] LVN Gonzales could not rebut what was said to the LVNs as a group, or individually, nor what was said to the CNAs because he was not present for any of those meetings. (Tr: 313.) The second Union witness was not questioned about any substantive matters. (Tr: 461-463.)

Regional Director's decision by finding that the Employer had raised "no substantial issues warranting review". (Exhibit 7.) As the preceding analysis shows, that is simply untrue. Not only did the Employer's Request for Review raise serious constitutional issues but whether an individual is a supervisor or an employee goes to the heart of the Act and necessarily should be reviewed by the Board. Prior to simply granting the General Counsel' s Motion for Summary, the Board should analyze the hearing and evidence underlying the Motion. The failure to do so violates the Act and the deprives the Employer of its due process rights under the Constitution – all the more so where a change in the Board's composition would cause a different result or where established appellate precedent will result in a finding that the LVNs are supervisors.

To that end, the Employer incorporates herein by reference its "Request for Review" and all of the arguments and factual references contained therein. (Exhibit 6.") The Board is requested to reach the merits of the dispute, and, upon this undisputed factual record, to find that the Employer's LVNs are supervisors and dismiss the Complaint.

Although the Employer's previously filed Request for Review details all the errors in the Regional Director's decision, for ease of reference, the Employer will summarize its legal and factual position. The Employer contended that it LVNs exercised various of the enumerated Section 2 (11) powers -- although the exercise of only one is sufficient to prove the supervisory status of a class of employees. *Oakwood Healthcare*, 348 NLRB 686 (2006). While the evidence was strongest that the LVNs had the authority to "reward" employees -- by determining the amount of their wage increases – there was also more than sufficient evidence to conclude that the LVNs (1) played an integral part in the hiring process, (2) assigned work, (3) released CNAs from work, (4) resolved grievances, and (5) disciplined the CNAs.

1. THE LVNs EVALUATED THE CNAs AND THE CNAs' DIFFERENTIAL WAGE RAISES WERE BASED ON THOSE EVALUATIONS.

Unquestionably, where a performance evaluation results in a wage increase, the individual who does the evaluation is a statutory supervisor. *E.g., Willamette Industries, Inc*., 336 NLRB 743, 744 (2001). As discussed in more detail *supra*, pp. 10-12, the evidence demonstrated that in the summer of 2016, the Westgate LVNs were tasked with evaluating the CNAs with the full knowledge that their evaluations would result in a differential wage increase being granted to the CNAs - a process that was also announced to all of the CNAs. That process was carried out by 19 different LVNs evaluating 65 CNAs resulting in 21 CNAs receiving a 3% wage increase, 35 CNAs receiving a 2% wage increase, and 9 CNAs receiving a 1% wage increase.

As noted, for spurious reasons, the Regional Director disregarded this evidence. But, apparently believing that she needed some "facts" to support her position, the Regional Director then resorted to irrelevant facts to support her conclusion.

- She states that there is no evidence that the LVNs played any role in determining which specific LVNs to evaluate -- a fact that is irrelevant to whether the LVNs did the evaluations and whether the evaluations were the basis for the CNAs' wage increases. (Exhibit 3, p. 10, n. 9.)
- She states that in doing the evaluations, the LVNs did not look at the CNAs' personnel files. (Exhibit 3, p. 10 n. 10.) Again, irrelevant. The LVNs were asked to evaluate the performances *they observed*, a decision that the Employer was legally free to make.
- She states that there is no evidence that the LVNs played any role in determining the range of raises to be given, e.g., 3% for excellent, 1% for fair. (Exhibit 3, p. 10, n. 11.) Again, irrelevant. *The LVNs determined the amount of the raise each individual received by virtue of the evaluation they gave; that is, a reward, pure and simple.* The fact that the Employer

determined the parameters of the wage increase does not change the fact that the LVNs determined *the particular wage increase given.*

- She states that because the LVNs were given no instructions on how to complete the evaluation form they did not use their independent judgment disregarding the fact that the LVNs were told the factors to analyze and the Employer was relying on the LVNs' professional judgment. (Tr: 161.) The LVN, who did testify, Gonzales, explained *in detail how he* went about evaluating the CNAs, clearly *showing the exe*rcise of independent judgment. (Tr: 382-388.)[7]

In sum, the only way that the Regional Director reached the conclusion that the LVNs were not exercising the Section 2(11) power to "reward" the CNAs was to ignore the record evidence and then to rely upon factors having nothing to do with the power exercised by the LVNs.

2. THE LVNs ALSO ASSIGNED WORK, DISCIPLINED EMPLOYEES, RELEASED EMPLOYEES FROM WORK, RESOLVED GRIEVANCES, AND EFFECTIVELY RECOMMENDED APPLICANTS TO BE HIRED.

Although the Employer was not required to prove that the LVNs exercised any other Section 2 (11) power, the record evidence also demonstrated that the LVNs disciplined the CNAs, assigned them work, released them from work, resolved their grievances, and played an effective role in the hiring process.

Commencing in July 2016, whenever the DSD had a CNA candidate, she brought a Charge LVN into the hiring interview and had the Charge LVN *conduct* the interview by asking the questions on the "standard' interview form. (Tr: 173-174.) The DSD told each of the LVNs that

[7] This finding is particularly troubling – first because it ignores the testimony of LVN Gonzales regarding how he went about evaluating the CNAs, and second, because if the Employer had given the LVNs the instructions that the Regional Director demanded, she would have surely concluded that the LVNs were not exercising independent judgment in evaluating the CNAs but merely following the Employer's directions. It was a "heads, I win; tails, you lose" proposition.

they were free to ask whatever additional questions they wished, and the LVNs did, in fact, ask additional questions. (Tr: 175.) Significantly, at the conclusion of the interview, when they were alone, the DSD asked the LVN his or her opinion as to whether the applicant should be hired. (Tr: 176.)

The evidence shows that the first such interview occurred on August 10, 2016 and continued thereafter. (Hearing Exhibit 9.) While not all of the applicants were hired, with respect to one candidate, the record evidence is unrefuted that while the DSD was *not* going to hire the candidate, the DSD changed her mind and hired the candidate based on the LVN's recommendation. (Tr: 176-177, 182-183, 263-264.) The Regional Director dismissed this evidence as "anecdotal" – although the LVN who made this recommendation was present at the hearing and *was not called to rebut this testimony or otherwise clarify it*.

Clearly, all the LVNs have yet to demonstrate the integral part they *now* play in the hiring process. But, that is only because the process was only recently implemented. As held in *Lakeland Health Care Associates, LLC v. NLRB*, *supra*, n. 6, with respect to the analogous situation dealing with limited disciplinary warnings: "We recognize that, in some cases, the infrequency with which purported authority is exercised may be relevant to determining whether such authority was actually vested in the employee. However, *logic dictates that this consideration has limited relevance* when the authority claimed is the authority to discipline, suspend, or terminate *and the frequency of the disciplinary incidents is limited*." (emphasis added.)[8]

[8] Not every individual in a given supervisory classification must actually exercise a power in order for the classification to be determined to be supervisory. "It is the existence of [a statutorily listed] authority that counts under the statute, and not the frequency of its exercise." *Beverly California Corp. v. NLRB*, 970 F.2d 1548, 1550, n.3 (6th Cir. 1992); and *see also Caremore, Inc. v. NLRB*, 129 F. 3d 365, 369 (6th Cir. 1997).

3. THE LVNS ROUTINELY DISCIPLINED THE CNAs.

The record evidence showed that LVNs routinely issued discipline to the CNAs. LVN Gonzales, *called by the Union to testify*, admitted that he routinely disciplined employees. At a meeting conducted by the Employer and in response to the Employer's assertion that the LVNs were supervisors, Gonzales unequivocally stated:

> "*I have been writing up people for three years*, how does that now make me a supervisor." (Tr: 359-360.)[9]

Moreover, LVN Gonzales testified that he was told that *he, as an LVN, would be subject to discipline if he failed to discipline the CNAs under his supervision.* His testimony was as follows:

> BY MR. BOIGUES [Union Counsel]: Abel, has anyone in management ever told you that if a CNA fails to perform his or her duties that you would be subject to discipline because of the CNA's failure to perform his or her duties?
>
> A Yes.
>
> (Tr: 459.)[10]

Gonzales' admissions are consistent with the DSD's testimony and the testimony of the facility Administrator. Both testified that they routinely received copies of discipline issued by the LVNs and that, for the most part, simply reviewed them and filed them away. (Tr: 71-72, 90-91, 207.) The DSD testified that she only got involved in reviewing the matter if the CNA complained that the discipline was unfair – an infrequent occurrence.

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[9] This same LVN, in his testimony, *repeatedly* claimed that the CNAs were *insubordinate* to him when they failed to do as he instructed. (See discussion *infra*, pp. 21-22.) The term "insubordination" is used by a supervisor when describing a subordinate's failure to follow an instruction. The term is not used by an employee to describe the refusal by a "fellow employee" to follow directions.

[10] Here, again, as part of the issuance of the new job description in July 2016, well before the filing of the representation petition, these specific LVN job duties were emphasized.

4. <u>THE LVNS ASSIGNED WORK TO THE CNAs AND RESOLVED THEIR GRIEVANCES.</u>

The LVNs routinely assigned the CNAs to work in different areas and/or with different residents. For various reasons, residents come and go from the facility (admissions, discharges, transfers, and deaths). At other times, CNAs leave work early. These occurrences require that the workload for the existing CNAs be rebalanced. This "re-balancing" is done by the LVNs. The LVNs must re-assign the CNAs to care for different residents. (Tr: 196-201.)[11]

Just as significantly, *currently*, the LVNs determine *what areas* each of the CNAs assigned to their Nurses' Station will work during patient lunch periods. There are 5 distinct assignments: Dining Room, Assisted Dining Room, Floor, Trays, and Trays & Floor. (Hearing Exhibit 10; Tr: 196-200, 403-423, 430-446.) Each of these responsibilities occurs *in a different area of the facility* and involves *different residents* and *different duties*.

The night shift LVNs make these assignments for breakfast while the day shift LVNs make the assignments for lunch and dinner. *Id*. The LVNs make these assignments by completing the "daily assignment sheet" and the LVNs are free to assign *any CNA* to any of these areas. (Hearing Exhibit 10.) Moreover, these meal periods consume a significant portion of the day. As held in *Glenmark Associates v. NLRB*, 147 F.3d 333 (4th Cir. 1998):

> "The authority to assign workers constitutes the power "to put [the other employees] to work when and where needed." *Monongahela Power Co. v. NLRB*, 657 F.2d 608, 613 (4th Cir. 1981). Such decisions are, in our view, inseverable from the exercise of independent judgment, especially in the health care context where staffing decisions can have such an important impact on patient health and well-being. An emergency decision regarding the appropriate staff level to accommodate ill patients requires a fact-specific individualized analysis of not only the patient's condition and the appropriate care, but also of the special

[11] Additionally, the DSD testified (and Gonzales' confirmed) that the LVNs routinely handle the CNAs' grievances. (Tr: 212-215, 455-456.) CNAs often complain about their workload, the LVNs failure to re-balance the workload, and the assistance, or lack of assistance, from their co-workers. These grievances are routinely resolved by the LVNs.

> skills of particular staff members. The conclusion that the Cedar Ridge LPNs exercise the authority to assign CNAs utilizing their independent judgment is sufficient for us to find that the Cedar Ridge LPNs are supervisors under the act. [Additional citation omitted.]"

The Regional Director disregarded this evidence asserting that there was no evidence that the LVNs exercised "independent judgment" in making these assignments. (Exhibit 3, p. 7.) In reaching this conclusion, she ignored LVN Gonzales' testimony. *To the extent that Gonzales' was allowed to be examined by the Employer's counsel*, Gonzales clearly established that the LVNs are responsible for the work done by the CNAs and ultimately responsible for the care that the CNAs give the residents. The CNAs are not free to ignore a directive given them by a LVN. Gonzales testified that when a CNA gave a reason for being unable to comply with the LVN's directive, it was up *to the LVN to accept or reject the CNA's stated justification*. Gonzales' testified:

> Q BY MR. TELFEIAN [Employer's Counsel] -- when you give his CNA instruction, do you view it as a mandatory instruction that they're required to follow or they're free to ignore you?
>
> A No, they're not free to ignore me on situations. That's expressed, *that's insubordination. And it goes to their boss*.
>
> ***
>
> Okay. All right. Now if the CNA -- the reason the CNA was free to disregard your instruction in that case is because the CNA responded I am busy?
>
> A Right, yeah.
>
> Q And you accepted that answer, correct?
>
> A Right, right.
>
> Q What about the CNA doesn't say anything. He just doesn't follow the instruction?
>
> A We have -- *I mean, no, that's insubordination*, too. If she's in front of me and I ask her to help or if she's not busy and she refuses, then I have to take care of.
>
> Q Okay. So you view it either the CNA does what you instructed them to do in that case, or they give you a reason why they can't do it, which you find acceptable?

A Right.

***

Q Are there other instances where you give instructions to CNAs that you -- that they're free to ignore, other than when they say they're busy.

A No.

(Tr: 403-406.) (emphasis added.)

Unfortunately, here again, because of the rulings issued by the Hearing Officer and interference by the Union's counsel, the record on these subjects (as well as concerning the discipline issued by the LVNs) is not as voluminous as it could or should be. As the reader of the record can ascertain, Gonzales' testimony *on cross-examination* was quickly establishing the supervisory status of the LVNs. *The longer Gonzales' testified, the more helpful he was in demonstrating the various authorities exercised by the LVN*s. It was the Hearing Officer's responsibility to ensure a complete record, not to truncate witness examinations to meet some arbitrary schedule that the Hearing Officer decided should be met.

5. <u>THE ENORMITY OF THE EVIDENCE SHOWS THAT THE LVNS WERE SUPERVISORS.</u>

As noted, to be a supervisor, an individual need only possess one of the enumerated supervisory powers. What is striking here is that not only did these LVNs obviously possess the power to reward, but there was proof that they exercised other supervisory powers as well. When the total picture is reviewed, it is obvious that these are individuals are not simply employees. The powers they exercised, when considered as a whole, went far beyond the powers granted employees. Moreover, what the LVNs and CNAs *were told* and what *they believed* demonstrates that the LVNs and CNAs both knew that the LVNs were the CNAs' supervisors.

- The LVNs were told they were supervisors; similarly, the LVN job description stated that the LVNs were supervisors.
- The CNAs were told that the LVNs were their supervisors.
- LVN Gonzales testified that he viewed the CNAs as his subordinates who were required to follow his directions or they would be disciplined.
- LVN Gonzales testified that he was responsible for the CNAs' conduct and he would be disciplined for their failures.

In sum, this is not a record where an employer seeks to rely upon an isolated fact to prove supervisory status. This is a record that is replete with evidence of supervisory status, and the contrary conclusion is premised on disregarding that record.

C. <u>THE NUMBER OF LVNs WHO ARE SUPERVISORS IS CONSISTENT WITH THE FACILITY'S NEEDS AND THE CNA WORKFORCE.</u>

The Regional Director also concluded that if she were to find that the LVNs were supervisors, the supervisor to employee ratio would be "improbably high", which, therefore, militated against finding the LVNs to be supervisors. (Exhibit 3, p. 20.) Ultimately, this is the real reason that the Regional Director distorted the record to conclude that these LVNs were not supervisors.

But, the Regional Director's conclusion is based on a faulty understanding of the "true" ratio. During a given week, at most, there would be 21.5 supervising LVNs present. More to the point, because the Charge LVNs are working three 12-hour shifts, usually there were 6 LVNs assigned to the day shift and 4 to 5 assigned to the night shift. In turn, those shift LVNs have to "man" three different nurses stations with, at the most, two LVNs on one station. Moreover, on the night shift (from 6 p.m. to 6 a.m. and all weekends) the Charge LVNs are *the most senior individuals in the facility*. It defies belief that the LVNs are not supervisors in a facility where

there are no more senior people present than the Charge LVNs to either supervise the CNAs or the facility's patients.

The Fourth Circuit made precisely this point in *Glenmark Associates Inc. v. NLRB*, *supra* in finding the contrary conclusion ludicrous:

> "We cannot fathom the Board's position that for more than two-thirds of the week at a nursing home providing twenty-four hour care, where patient conditions can change on a moment's notice, there is no one present at the facility exercising independent judgment regarding proper staff levels and patient assignments. The Administrator's testimony cited above confirms that the LPNs are left in total control of the nursing home during evening and weekend hours. Quite obviously many scheduling decisions made "routinely" by the LPNs at Cedar Ridge must require independent judgment. The Board mistakenly assumes that because there is an established procedure for handling a particular scheduling situation, nobody is required to think. In the Board's view, LPNs just mechanically follow established procedure. The record before us reveals the fallacy of the Board's logic. Although there is a general procedure in place regarding whom to call to work should an absence occur, on some occasions the LPNs, either the charge nurse or any floor nurse, exercise their independent judgment and decide to operate the nursing home or their floor shorthanded. Record testimony demonstrates that LPNs on the floor have the authority to allow CNAs to leave Cedar Ridge early, and when that occurs they generally reassign the remaining CNAs to ensure adequate patient coverage. In other situations, where the charge nurse is confronted with a floor in which patients are sicker than usual, the charge nurse may make a decision to assign an additional CNA to that area."

The same analysis is precisely true for this Employer. The facility and its employees take care of, on a 24-hour basis, very sick people who are not capable of caring for themselves. Some one at the facility has to make decisions on a daily and hourly basis on how to care for these individuals and those decisions involve staffing and independent professional judgment. Certainly, in the 132 hours per week where the Administrator, the DON, the ADONs, and the DSD are absent, those decisions, *supervisory decisions*, are being made by the Charge LVNs. Then Acting Chairman Miscimarra acknowledged precisely this point in his dissent, but unfortunately, the Board majority chose to conclude that a nursing home can be effectively run without supervisors – a preposterous proposition.

D. THE LVN JOB DESCRIPTION AND WHAT THE CNAs WERE TOLD LEAVES NO DOUBT CONCERNING THE LVNs' SUPERVISORY STATUS.

The LVNs' job description also left no doubt concerning their supervisory powers providing in relevant part:

> Develop and distribute resident care assignments to direct care staff…
>
> ***
>
> Perform performance evaluation reviews for staff, including determination of wage increases if applicable.
>
> Correct staff performance and administer discipline, if required.
>
> ***
>
> Take job actions with staff members under appropriate circumstances."
>
> (Hearing Exhibit 1.)

Although the record evidence was crystal clear that this job description *was the job description in effect at the relevant time*, the Regional Director disregards it asserting that the evidence failed to "conclusively establish" which of three job descriptions was applicable. (Exhibit 3 p. 21.) This is an outright distortion of the record.

The Employer's evidence established that this job description was put in effect in the summer of 2016. (Tr: 37-38.) While the Union put into evidence a previous job description (as did the Employer), there was no evidence that contradicted the testimony that *the July 2016 job description was in effect at the time of the petition.*[12]

[12] When the Employer sought to call a witness to "clarify" any confusion surrounding these different job descriptions, the Hearing Officer barred the Employer from calling the witness. (Tr: 464-465.) The Hearing Officer also barred the Employer from questioning LVN Gonzales on this subject matter. (Tr: 466.) Having prevented the record from being clear, the Regional Director then relied on this claimed ambiguity to disregard the record evidence. The plain truth is that the evidence established that the Employer had promulgated a new job description in July 2016 and

IV. CONCLUSION

The record evidence demonstrates that the LVNs were Section 2(11) supervisors. The contrary decision is based on a rejection of the record evidence. The Board should deny the General Counsel's Motion for Summary Judgment and find that the LVNs are statutory supervisors.

Dated: June 29, 2017

Respectfully Submitted,

s/ Henry F. Telfeian

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had each and every LVN read and acknowledge it. There was no ambiguity in the record.

CERTIFICATE OF SERVICE

This is to certify, under penalty of perjury under the laws of the United States, that on this date I have served a true and correct copy of RESPONDENT'S OPPOSTION TO GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT AND TO CHARGING PARTY'S JOINDER in Case Nos. 32-CA-190480 and 32-CA-197298 via electronic mail, and by United States first class postage prepaid, to the following individuals at the following addresses:

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This 29th day of June 2017

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